



POLICE DEPARTMENT

August 10, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michael McCarthy
Tax Registry No. 922631
72 Precinct
Disciplinary Case No. 85138/09

Police Officer John Rivera
Tax Registry No. 904901
72 Precinct
Disciplinary Case No. 85150/09

The above-named members of the Department appeared before me on
January 5, 2010, and April 28, 2010, charged with the following:

Disciplinary Case No. 85138/09

1. Said Police Officer Michael McCarthy, while on-duty and assigned to the 72nd Precinct, on or about December 14, 2008, having been made aware of an allegation of corruption or other misconduct against another Member of the Service, failed to notify the Internal Affairs Bureau, as required.

Interim Order No. 9 Revision to P.G. 207-21 – ALLEGATIONS OF CORRUPTION
AND SERIOUS MISCONDUCT
AGAINST MEMBERS OF THE
SERVICE - 04/07/08

2. Said Police Officer Michael McCarthy, while on-duty and assigned to the 72nd Precinct, on or about December 14, 2008, having been made aware of an allegation of corruption or other misconduct against another Member of the Service, failed to notify the Patrol Supervisor or Commanding Officer, as required.

P.G. 202-21, Page 1, Paragraph 6 – POLICE OFFICER
DUTIES AND RESPONSIBILITIES

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3. Said Police Officer Michael McCarthy, while on-duty and assigned to the 72nd Precinct, on or about December 14, 2008, failed to conduct a proper investigation into the involvement of another Member of the Service, in an unusual police occurrence in that he failed to request said police officer's identification, failed to confirm that said police officer was in fact a police officer and failed to ascertain the facts surrounding said police officer's involvement in the unusual police occurrence.

P.G. 202-21, Page 1, Paragraph 10 – POLICE OFFICER
DUTIES AND RESPONSIBILITIES

Disciplinary Case No. 85150/09

1. Said Police Officer John Rivera, while on-duty and assigned to the 72nd Precinct, on or about December 14, 2008, having been made aware of an allegation of corruption or other misconduct against another Member of the Service, failed to notify the Internal Affairs Bureau, as required.

Interim Order No. 9 Revision to P.G. 207-21 – ALLEGATIONS OF CORRUPTION
AND SERIOUS MISCONDUCT
AGAINST MEMBERS OF THE
SERVICE - 04/07/08

2. Said Police Officer John Rivera, while on-duty and assigned to the 72nd Precinct, on or about December 14, 2008, having been made aware of an allegation of corruption or other misconduct against another Member of the Service, failed to notify the Patrol Supervisor or Commanding Officer, as required.

P.G. 202-21, Page 1, Paragraph 6 – POLICE OFFICER
DUTIES AND RESPONSIBILITIES

3. Said Police Officer John Rivera, while on-duty and assigned to the 72nd Precinct, on or about December 14, 2008, failed to conduct a proper investigation into the involvement of another Member of the Service, in an unusual police occurrence in that he failed to request said police officer's identification, failed to confirm that said police officer was in fact a police officer and failed to ascertain the facts surrounding said police officer's involvement in the unusual police occurrence.

P.G. 202-21, Page 1, Paragraph 10 – POLICE OFFICER
DUTIES AND RESPONSIBILITIES

The Department was represented by Pamela Naples, Esq., Department Advocate's Office, and the Respondents were represented by Michael Martinez, Esq.

The Respondents, through their counsel, entered pleas of Not Guilty to the subject

charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondents are found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on December 14, 2008, at about 0450 hours, the Respondents were on duty, in uniform, assigned to patrol duties in the 72 Precinct in a marked Radio Motor Patrol car (RMP) when they received a "10-13" radio transmission to respond to a location on 56 Street about one-half block from Lutheran Hospital in Brooklyn.

The Department's Case

The Department called Probationary Police Officer Emilio Laboy, Sergeant Steven Jerome and Sergeant John Clisti as witnesses.

Probationary Police Officer Emilio Laboy

Probationary Police Officer Emilio Laboy testified that on December 13, 2008, he was assigned to Patrol Borough Staten Island and that he performed a 1730 hours to 0205 hours tour of duty. Upon the completion of his tour he went home to his residence on Staten Island. After he arrived home, at about 0300 hours, he received a telephone call

from a friend, Anthony Pippo, who told him that he should come to Brooklyn because a mutual friend, Anthony Mazzriello, had been involved in a fight inside "Kettle Black," a bar located on the corner of 88 Street and 3rd Avenue, and that Mazzriello was going to be transported to a hospital by an ambulance. Laboy drove to the bar. When he arrived, he was met by Pippo. Pippo and Cesar Tryor, who Laboy knew, got into his car and he drove to Lutheran Hospital.

They arrived at Lutheran Hospital 15 minutes later. They entered the emergency room (ER) and saw friends and family of Mazzriello there. Two men who Laboy had never seen before entered the ER. (He later learned that one of the men was a Probationary Police Officer named Ward.) Pippo and Tryor identified Ward and the other man as two of the males who had been involved in the fight inside the bar. Words were exchanged. Ward and the other man left the ER and started running. Pippo, Tryor and a third man, who Laboy did not know, chased them. Laboy ran after them. About a half block away, Laboy caught up with them. Ward collapsed to the ground and displayed a Department ID card which indicated that he was a Probationary Police Officer. Laboy showed Ward his Department ID card. As Ward began asking Laboy if he could talk to him, an RMP pulled up and the Respondents got out. Laboy displayed his Department ID to the Respondents.

He spoke to the Respondents separately. He told Respondent McCarthy that he was an off-duty officer and that he had come to the hospital to visit an injured friend. Respondent McCarthy asked him what exactly had happened. He told him that there had been an altercation earlier that night between Pippo, Tryor, Mazzriello and "the two gentlemen that walked into the ER." He had no further conversation with Respondent

McCarthy. Two minutes later, Laboy told Respondent Rivera that his friends had been in an altercation and that he had come to the hospital to check up on them. Respondent Rivera told him that he could go back to the ER waiting room.

More RMPs arrived at the scene but Laboy did not speak to any of the officers in these RMPs and he did not call for the patrol supervisor to respond. Laboy stood off to the side and then reentered the ER waiting room. Ten minutes later, Laboy saw Respondent Rivera enter the ER waiting room but he did not approach Respondent Rivera and Respondent Rivera did not approach him.

On cross-examination, Laboy acknowledged that he pleaded guilty to four Specifications charging him with failing to call for the patrol supervisor to respond, not possessing his shield, failing to notify the Internal Affairs Bureau (IAB) that Ward may have committed an assault, and “failing to disclose his complete involvement in an unusual police occurrence.” [Respondent’s Exhibit (RX) A]. Laboy further acknowledged that Pippo and Tryor were intoxicated and that Ward was also intoxicated when Pippo and Tryor chased after Ward and his friend as they were leaving the ER. Laboy admitted that before the Respondents arrived at the scene, he had taken Ward’s ID out of his hand to look at it. When the Respondents arrived at the scene, they immediately started to separate the two groups by grabbing individuals and telling them to put their hands up.

Laboy admitted that at his official Department interview he had told his interrogators that the Respondents had asked him if he anything to do with the dispute, that he had told them “no,” and that he only told them that he had come to check on his friend at the hospital because his friend was in a dispute and had been transported to the

hospital and had called him. Laboy also admitted that he never told the Respondents that the street altercation they had arrived at had started inside the ER when he had “chased the chasers” by following his friends out of the ER when they started chasing Ward and his friend. At his official Department interview, he never told his interrogators that he had spoken to the Respondents separately.

Sergeant Steven Jerome

Sergeant Steven Jerome testified that on December 14, 2008, at about 0450 hours, he was on duty assigned as patrol supervisor in the 68 Precinct in a marked RMP when he received a “10-13” radio transmission to respond to 227 56 Street about one-half block from Lutheran Hospital in Brooklyn. When he arrived he asked Respondent Rivera what was going on and he responded by saying that there had been a dispute at the hospital, that he and Respondent McCarthy had pursued the disputers, and that one was a police officer. Jerome interviewed Ward. Ward told Jerome that there had been an altercation earlier that night inside the “Kettle Black” bar and that some of the injured participants had gone to the hospital and that there was a second altercation there. Jerome testified that because Ward was a police officer, he called for the Duty Captain to respond. Jerome later learned that a Probationary Police Officer named Laboy had been present at the scene. Jerome testified that the Respondents should have told him that there was another officer at the scene in addition to Ward. If the Respondents had told him that there was another officer who was at the scene in addition to Ward, he would have told that officer to remain at the scene and wait the arrival of the Duty Captain.

On cross-examination, Jerome recalled that Respondent McCarthy had personally detained three males who had been involved in the incident. Jerome testified that the Respondents were only obligated to tell him that Laboy had been at the scene if the Respondents believed that Laboy was involved in the incident.

Sergeant John Clisti

Sergeant John Clisti testified that on December 14, 2008, he was on duty assigned to IAB Group 32 when he responded to the 72 Precinct to interview civilian witnesses because the Duty Captain had reported that a Probationary Police Officer named Ward had been involved in an incident inside the “Kettle Black” bar in the 68 Precinct. One of these civilian witnesses reported that a Probationary Police Officer named Laboy had been present at Lutheran Hospital where civilians injured inside the “Kettle Black” had been taken.

On cross-examination, Clisti testified that civilian witnesses told him that Laboy had run after Ward when Ward ran out of the hospital. Clisti agreed that, based on his investigation, he concluded that Laboy never told the Respondents that he had done anything wrong.

The Respondent’s Case

The Respondents testified in their own behalf.

Respondent McCarthy

Respondent McCarthy testified that he and Respondent Rivera arrived to find a chaotic street scene involving two groups of males opposing each other. As they were getting out of their RMP, Laboy approached the RMP and stated that he was “on the job,” that he was “not involved,” and that he was “here to visit a friend in the hospital who was assaulted.” Respondent McCarthy asked Laboy if he had made the “10-13” call to 911. When Laboy replied “No,” Respondent McCarthy told Laboy to “wait.”

Respondent Rivera

Respondent Rivera testified that as he and Respondent McCarthy were separately dealing with the two groups of youths, they both also “had to watch each other’s backs” until two other sector units arrived at the scene. Police Officer Taylor, who was in one of the units, told him that he had called for a supervisor to respond to the scene.

Respondent Rivera testified that because he saw that Laboy was standing on the sidewalk across the street from the two groups, he asked Laboy what he was doing there. Laboy told him that he was “on the job” and that he was there to see a friend who was in the hospital. Laboy then walked to the ER. Respondent Rivera testified that he did not believe that Laboy was involved in the dispute between the two groups because none of the youths in either group had pointed at Laboy.

Later, Respondent Rivera entered the ER and saw Laboy in the waiting room of the ER. Respondent Rivera wrote down the names of the injured parties who were in the ER but he did not ask the Respondent for his name. Respondent Rivera testified that he did not ask Laboy, and that Laboy never volunteered, why his friend was in the hospital.

Respondent Rivera testified that as far as he knew, Laboy's friend was in the hospital because he was "sick."

On cross-examination, Respondent Rivera acknowledged that he was present with Jerome when Jerome interviewed Ward.

FINDINGS & ANALYSIS

Since the charges against the Respondents in these two disciplinary cases are identical, they will be analyzed together.

Under Specification Nos. 1 and 2, it is charged that the Respondents, having been made aware of an allegation of corruption or other misconduct against Laboy, another member of the service, failed to notify the Internal Affairs Bureau, the Patrol Supervisor or the Commanding Officer, as required.

Initially, it must be noted that after they had received a "10-13" call, the Respondents were the first officers to arrive at a chaotic street scene where two groups of intoxicated youths were brawling. Laboy acknowledged that Pippo and Tryor were intoxicated and that Probationary Police Officer Ward was also intoxicated and was on the ground. Thus, the Respondents were immediately faced with the task of identifying which of the males was the officer in need of assistance, the task of determining who had been involved in the altercation, and the task of separating the two groups in order to end the altercation and secure the scene. The Respondents also, as Respondent Rivera put it, both "had to watch each other's backs" as they were trying to accomplish these tasks.

Thus, at the point in time when their brief verbal interactions with Laboy took place, the Respondents were very busy and they could not focus their full attention on Laboy. Laboy acknowledged that when the Respondents arrived at the scene and he approached them, they had immediately begun to separate the two groups by grabbing individuals and telling them to put their hands up.

Also, in her summation, the Assistant Department Advocate (the Advocate) admitted that, "In this case, we don't have someone actively telling Police Officer McCarthy and Police Officer Rivera that Probationary Police Officer Laboy was involved in the underlying assault or the chase that led to the police being involved..." Thus, the Advocate conceded that no one told either of the Respondents that Laboy had committed any misconduct and Clisti testified that his investigation determined that Laboy never told the Respondents that he had done anything wrong.

The Advocate stated that the Department's position that the Respondents were, nonetheless, required to make notifications that they were aware of an allegation of misconduct against Laboy was based on a theory that because they were aware that "Laboy was present at or near the scene of this incident...that's enough to require them to make the appropriate notifications. It is not Police Officer McCarthy's and Police Officer Rivera's job to determine whether or not Probationary Police Officer Laboy was involved. They had a duty to make the appropriate notifications about his presence at the scene."

I agree with the Advocate's statement that it was not the Respondents' job to determine whether or not Laboy was involved. However, I cannot adopt the Advocate's position that when an on-duty officer who has responded to the scene of an incident

becomes aware that an off-duty officer is merely “present at or near the scene,” the on-duty officer is required to report the off-duty officer’s presence at the scene by making notifications pursuant to the Patrol Guide sections cited under Specification Nos. 1 and 2. The Advocate’s position is inconsistent with Patrol Guide Procedure No. 207-21 which states that a member of the service “(u)pon observing, or becoming aware of corruption or other misconduct or upon receiving an allegation of corruption or other misconduct involving a member of the service” must immediately contact IAB.

Also, since Department’s witness Jerome testified that the Respondents were only obligated to tell him, the patrol supervisor, that Laboy had been at the scene if the Respondents believed that Laboy had been involved in the incident, and since the Department did not refute that Respondents’ argument that it is not unusual for patrol officers who respond to a street incident to learn that an off-duty member is present observing the police response as a bystander, the Department did not establish that the Respondents were required to report Laboy’s presence under Patrol Guide Procedure No. 202-21(6) which states that a police officer must “(r)eport immediately to the patrol supervisor and the platoon commander any unusual crime, occurrence or condition.”

I find that the Advocate’s position constitutes an overly expansive interpretation of the circumstances under which members are required to make notifications under the cited Patrol Guide sections. As a result, the Respondents are found Not Guilty of Specification Nos. 1 and 2.

With regard to Specification No. 3, contrary to the Advocate’s statement in her summation that “it is not Police Officer McCarthy’s and Police Officer Rivera’s job to determine whether or not Probationary Police Officer Laboy was involved” in the

occurrence they had responded to, this charge alleges that the Respondents failed to conduct a proper investigation into the involvement of Laboy in an unusual police occurrence, in that neither of the Respondents requested to see his ID card or otherwise confirmed that Laboy was actually a police officer, and in that they failed to ascertain the facts surrounding his involvement in the unusual police occurrence.

As noted above, as the first officers to arrive at a chaotic street scene where two groups of intoxicated youths were brawling, from the time they got out of their RMP, the Respondents' hands were full. As a result, I credit their testimony that they were focused on the job at hand, not on what Laboy was saying to them.

The Respondents' testimony regarding their brief interactions with Laboy

Respondent McCarthy testified that the only interaction he had with Laboy was when Laboy came up to him just as McCarthy was getting out of the RMP and stated that he was "on the job," that he was not involved in what was going on, and that he was there only because he was visiting a friend in the hospital who had been assaulted.

Respondent McCarthy testified that he had asked Laboy if he had called 911 and that when Laboy replied that he had not called 911, he merely told Laboy to "wait."

Respondent Rivera testified that when he saw Laboy standing on the sidewalk across the street from the two groups, he asked Laboy what he was doing there and that Laboy replied that he was "on the job" and that he was there to see a friend who was in the hospital. The fact that when Respondent Rivera entered the ER Laboy was in the waiting room of the ER, does not support the Department's contention that Respondent Rivera should have questioned Laboy about his presence because Laboy's presence in the

waiting room was consistent with Laboy's claim that he had come to the hospital to visit a friend.

Thus, based on the testimony of the Respondents, there was no reason for either of them to request that Laboy display his Department ID card or otherwise confirm that he was actually a police officer, or to question Laboy about his involvement in an earlier incident because, based on what Laboy had told them, he was no more than a mere bystander who was present outside the hospital only because he happened to be visiting a friend who had been hospitalized.

Since, based on the testimony of the Respondents, there was no reason for either of them to question Laboy about anything, the Department's case rests solely on Laboy's testimony.

Laboy's testimony and his statements at his official Department interview

Laboy basically corroborated the testimony of the Respondents with one exception: Laboy claimed that he told each of them separately that his friends had been in an altercation earlier that night. I find it significant that Laboy testified on direct examination that he told Respondent McCarthy that there had been an altercation earlier that night between Pippo, Tryor, Mazzriello and "the two gentlemen that walked into the ER." At the point in time that Laboy was speaking to Respondent McCarthy, Laboy knew that one of "the two gentlemen that walked into the ER" was a police officer, Ward. In fact, Laboy was certain that Ward was a police officer because, before the Respondents arrived at the scene, Laboy had taken Ward's ID out of his hand to look at it. Yet, Laboy did not assert that he had told Respondent McCarthy that one of the men

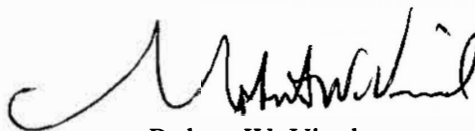
who walked into the ER was a police officer, or that he had handed his Department ID to Laboy, or that his name was Ward.

Moreover, Laboy admitted that at his official Department interview he had stated that he only told the Respondents that he had come to check on his friend at the hospital because his friend was in a dispute and had been transported to the hospital and had called him. Laboy also admitted that he never told the Respondents that the street scene they had arrived at had started inside the ER waiting room when he had followed his friends out of the ER because they were chasing Ward and his friend.

Based on the above, especially the inconsistencies between what Laboy stated at his official Department interview and his testimony at this trial regarding what he told the Respondents, I find that Laboy's testimony is insufficiently reliable to meet the Department's burden of proving this charge by a preponderance of the credible evidence.

The Respondents are found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner – Trials

APPROVED
DEC 29 2010

RAYMOND W. KELLY
POLICE COMMISSIONER